Supreme Court, U.S.
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No. 95-2039

In The

Supreme Court of the United States

October Term, 1995

LEROY LOGAN,

Petitioner,

vs.

BENNINGTON COLLEGE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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I. IF THE ABSENCE OF ESTABLISHED PROCEDURES AND INDEPENDENT REVIEW FOR A RECUSAL REQUEST AMOUNT TO A DENIAL OF DUE PROCESS, THEN ANY OTHER ACTION TAKEN BY THE SECOND CIRCUIT DOES NOT REMEDY THE DENIAL OF DUE PROCESS.

Petitioner has requested that the Court grant this Writ of Certiorari to determine whether due process requires that a motion to recuse a judge of a United States Court of Appeals based upon an allegation of bias be decided or reviewed based on established procedures and by a judge other than the judge who is the subject of the motion.

Petitioner makes this request because after he alleged that the impartiality of Judge Altimari could be reasonably questioned, nothing in the record indicates that anyone other than Judge Altimari himself ruled upon the motion for recusal. At present, the law leaves petitioner, and similarly situated litigants, in a situation in which there is no established means by which to seek review of the question whether a court of appeals judge harbors improper bias, and no legal right to expect that any particular procedure, or any established procedure at all, will be followed by a court of appeals or court of appeals judge in resolving such a question.

Respondent replies to petitioner's due process concerns by pointing out that the Second Circuit opinion in this matter was unanimous, and in addition, that no Second Circuit justice voted for an en banc review of the case. Therefore, according to respondent, any bias on Judge Altimari's part is of no consequence.

Petitioner's writ should be granted, however, to establish procedures for the treatment of recusal motions and guarantee

independent review of a judge's initial recusal decision. Absent such procedures public confidence in the judicial process is undermined.

If Petitioner's challenge suggests Judge Altimari harbors a bias, then the Judge should not have participated in any way in the decision making process in this case. The fact that two other judges voted with Judge Altimari does not cure the due process violation. No one can measure Judge Altimari's impact on the outcome. Judge Altimari was the most active judge at the oral argument. He wrote the Second Circuit's opinion in this case. It appears that he actively participated in deliberations with the other judges regarding the disposition of this matter. Judge Altimari's participation and vote were not "mere surplusage." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827 (1985).

The fact that no other judge voted for en banc review is an equally unpersuasive argument. Nothing in the record suggests that any other Circuit Judge considered it appropriate to determine whether Judge Altimari should be recused. In fact, as pointed out in petitioner's brief, appellate court judges have declined to consider petitions to disqualify other appellate court judges. *See, e.g., Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1059 (7th Cir. 1992) (Posner, J.). Therefore, it cannot be assumed that any independent review of Judge Altimari's refusal to recuse himself has taken place.

II. UNDER THE FACTS OF THIS CASE, THE RECUSAL REQUEST WAS TIMELY.

Petitioner acknowledges that a motion for disqualification of a judge must be made in a timely fashion. Under the circumstances of this case, however, the recusal request was timely. The request was made promptly after reading the opinion by Judge Altimari which informed petitioner of the nature and extent of his bias against petitioner.

The first obligation for recusal rests with the judge himself: "It is true that under § 455 a judge may have an obligation to recuse himself or herself without a motion from one of the parties; it is 'self-enforcing on the part of the judge.' " *E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) (quoting *United States v. Sibla*, 624 F.2d 864, 867-68 (9th Cir. 1980)). When left to the litigants to raise the issue, "there is no *per se* rule that recusal motions be made at a fixed point in order to be timely. *Id.; see Preston v. United States*, 923 F.2d 731, 733 (section 455 motion timely even though made 18 months after assignment to district judge and shortly after an adverse discovery ruling). Petitioner agrees with Respondent "that timeliness requires the party making the recusal motion to do so 'at a reasonable time in the litigation,' and not delay for strategic purposes." Respondent's Brief at 14 (quoting *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989)). Petitioner met this standard.

Respondent's own arguments belie any assertion that petitioner's request was untimely. Respondent maintains that nothing in Judge Altimari's comments at oral argument would lead an objective disinterested observer, fully informed of the facts, to have significant doubt that justice could be done. At the same time, respondent maintains that petitioner's recusal request was untimely because petitioner did not make his request immediately after oral argument. The only way to reconcile these two positions is to acknowledge the validity of petitioner's position: The recusal motion was timely because it is only upon noting the inclusion of certain irrelevant material in the written opinion of Judge Altimari that the prejudicial impact of his comments at oral argument became clear.

CONCLUSION

As this Court should establish guidelines regarding motions made pursuant to 28 U.S.C. § 455 for the recusal of an appellate court judge and to guarantee independent review of a federal appellate court judge's refusal to recuse himself after an allegation of bias, this petition for certiorari should be granted.

Respectfully submitted,

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